

## OFFICE OF CONGRESSIONAL AFFAIRS

### Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	XX	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
6. Ch/House Affairs		
7. Admin Officer		
8. FOIA Officer		
9. Constituent Inquiries Officer		
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12.		

SUSPENSE

1 sept 88

Date

STAT

Action Officer:

Remarks:

Action completed on Feb. 21/  
Brandon Blum week of 26 Aug. 1988  
MFR # OCA3006-88.

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Remarks:	

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26 aug 88

Name/Date



**EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503**

August 25, 1988

**LEGISLATIVE REFERRAL MEMORANDUM**

OCA FILE *Leg*

OCA 88-2854

**SPECIAL**

**TO:** Department of State - Brownyn Bachrach (647-4463)  
Department of Health & Human Services - Fran White (245-7750)  
Department of the Treasury - Carole Toth (566-8523)  
General Services Administration - Al Vicchiolla (566-0563)  
Central Intelligence Agency

**SUBJECT:** Department of Justice proposed report on H.R. 4710 --  
To authorize appropriations for the Department of Justice  
for FYs 1989 and 1990.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

**Please provide us with your views no later than September 1, 1988.**

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

*[Signature]*  
Assistant Director for  
Legislative Reference

**Enclosure**

cc: Karen Wilson                      Bill Coleman  
Tara Treacy                          Ed Rea  
Adele Fasano



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Peter W. Rodino, Jr.  
Chairman  
Committee on the Judiciary  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to advise you of the Department of Justice's views on H.R. 4710, a bill to authorize appropriations for the Department of Justice for FYs 1989 and 1990. We regret that we must oppose enactment of the bill in its current form and we urge that it be amended consistent with this letter.

I. Funding Levels

The proposed funding levels of H.R. 4710 differ from those levels recommended in the President's budget for 1989. In those areas where the funding level is below that recommended in the Administration's budget, H.R. 4710 prohibits the Department from carrying out its essential functions, such as fighting the war on drugs, and incarcerating federal prisoners. H.R. 4710 funding levels in this regard are inconsistent with Congress' previous commitment to strengthen law enforcement programs. In those categories where levels are somewhat above the Administration's request, H.R. 4710 provides resource levels for unforeseen circumstances, such as prisoner riots or increased litigation. However, in areas where H.R. 4710 authorizes a level well above the request, we recommend that it be adjusted as these levels may be detrimental to areas of the Department in need of additional resources. The following is a review of each level in H.R. 4710 that differs from the Administration's request.

At this time, it is premature for the Department to comment on the FY 1990 resource levels authorized in the Bill. The Department is currently in the process of developing the FY 1990 budget, and the Administration has yet to make any Department of Justice related FY 1990 budget decisions. Therefore, the proposed levels should be considered tentative and subject to change.

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General Administration (GA)

As submitted, H.R. 4710 authorizes \$123,987,000 for GA in 1989; this is \$23,185,000 or 23 percent above the President's budget of \$100,802,000. This amount is in excess of the Department's needs; the level in the President's request would be sufficient to meet GA's needs in 1989.

General Legal Activities - Office of Special Investigations (OSI)

The Bill, as introduced, includes an earmarking of \$4 million for investigation and prosecution of denaturalization and deportation cases involving alleged Nazi war criminals. The Department does not support a minimum funding level of \$4 million for this program for several reasons. First, since the establishment of the OSI in the late 70's, the Office has never been able to use fully all of the resources appropriated for it. Second, considering the ages of the perpetrators and their victims and/or witnesses, a decline in the Office's workload is inevitable. Third, the Department generally is opposed to earmarking in authorization or appropriation acts because this places further limits on the Department's ability to manage programs effectively. In the case of OSI, the Department's efficiency would be impaired while OSI would be forced to seek creative ways to use the additional funding or to allow unusable funding to lapse.

Antitrust Division

H.R. 4710 authorizes \$51,497,000 for Antitrust in 1989; this represents a \$4,476,000 or 10-percent increase over the President's budget of \$47,021,000. Once again, these amounts are in excess of Departmental needs; the levels in the President's request would be sufficient to meet Antitrust's needs in 1989.

U.S. Marshals

Page 2, Sec. 101(6) should be changed to read as follows:

(6) For the United States Marshals Service; \$207,582,000 for the fiscal year 1989 provided, that notwithstanding the provisions of title 31 U.S.C. 3302, the Director of the United States Marshals Service may collect fees and expenses for the service of civil process, including: complaints, summonses, subpoenas and similar process; and not to exceed \$1,000,000 of such fees shall be credited to this appropriation to be used for salaries and other expenses incurred in providing these services.

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### U.S. Attorneys

Funding provided in the bill for the U.S. Attorneys does not address the need for additional resources in U.S. Attorneys' offices nationwide in 1989 to address the demand for increased prosecutions in several areas. Most important of these areas is the intensive effort to rid the nation of narcotics and dangerous drugs. It is clear that a \$16.8 million reduction, a 4-percent reduction to the President's budget, would have a devastating effect on the ability of the U.S. Attorneys to prosecute cases being brought to them by the Government's law enforcement agencies.

Without the resources requested in the 1989 budget, the Department's representation in the courtroom will be dealt a serious blow, and a signal will be sent to those who would violate our laws, in particular, the drug trafficking laws, that our enforcement efforts lack credibility. Drug prosecutions continue to consume significant attorney resources and have become more complex. The enhanced penalties of the Anti-Drug Abuse Act of 1986 will result in more defendants electing a jury trial, thereby requiring additional prosecutors just to handle existing workload.

Additionally, the Department requested \$10 million, for the U.S. Attorneys, to enhance debt collection efforts in 1989. Experience has shown that failure to provide resources to pursue debtors is a "penny-wise, but pound-foolish" strategy. If debtors are aware that the Government will ignore overdue obligations, they will persist in nonpayment; conversely, a vigorous effort to collect delinquent debts provides a powerful incentive to pay up.

### U.S. Trustees

Page 2, Sec 101(11) should be changed to read as follows:

(11) For the United States Trustee System Fund: \$59,493,000 for the FY 1989, which shall remain available until expended provided, that deposits to the fund shall be available in such amounts as may be necessary to pay refunds due depositors; and provided further, that obligated balances remaining as of September 30, 1988 in the appropriation "Salaries and expenses, Oversight of Bankruptcy Cases" shall be merged with the "United States Trustee System Fund."

This language would merge the obligated balances of the previous appropriation "Salaries and expenses, Oversight of Bankruptcy Cases" into the U.S. Trustee System Fund. This will simplify accounting procedures and eliminate the long-term maintenance of two appropriations.

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Federal Bureau of Investigation (FBI)

The 1989 authorization level as reported in H.R. 4710 for the FBI is \$1,431,260,000. Compared to the President's budget request, this represents a decrease of \$72,047,000 or 5 percent. This action would have a devastating effect on the effectiveness of the FBI. For 1989, H.R. 4710 includes no enhancements for the FBI with the exception of a \$20 million enhancement earmarked for implementation of NCIC-2000, the National Crime Information Center (NCIC), as indicated under paragraph (13)(E). This paragraph should be amended with the addition of "which shall remain available until expended." This would make the \$20 million for NCIC "no-year funding," and would ensure that it be set aside to support development and implementation of NCIC without being hindered by the time constraints of the contracting process. Subtracting the \$20,000,000 dedicated authority for NCIC, the FBI would have an authorization of \$1,411,260,000, which is the base level requested for 1989. This balance is clearly inadequate as it could not cover all FBI operations, including additional responsibilities imposed by the recent ratification of the Intermediate-Range Nuclear Forces Treaty (INF Treaty).

This total amount for the FBI would deny vital enhancements needed for the Foreign Counterintelligence program to counter the ongoing threat from activities of hostile intelligence services operating in the United States. Other major increases denied would be in the Organized Crime and Drugs programs where the FBI has experienced significant progress and requires additional resources to maintain the momentum recently achieved. Another significant enhancement denied is for white-collar crime where workload is expanding in the Department of Defense procurement fraud, bank fraud and environmental crimes areas among others.

H.R. 4710 authorizes only \$45,000 for official reception and representation expenses. The FBI had requested authority to expend \$70,000 for such expenses. This increase would have no impact on budget authority. The reduced limitation amount, although relatively small, will have an adverse impact on the FBI's ability to accommodate representatives of friendly foreign law enforcement and those countries' official representatives. Such a reduction will also adversely affect the level of liaison necessary for our legal attaches to obtain support for our foreign investigative and intelligence responsibilities. It is unwise to make such a reduction at a time when the FBI is being called upon to play a greater role in international criminal investigations, particularly those dealing with drug trafficking and counterterrorism.

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Drug Enforcement Administration (DEA)

Under H.R. 4710, DEA is authorized \$549,000,000 for the FY 1989, this is \$10,928,000 or a 2-percent increase over the President's budget of \$538,072,000. Although this authorization is greater than that requested, DEA can certainly spend the additional resources wisely, given the dire need to solve the drug problem. The additional resources would help DEA continue its high-quality investigations.

The Department requests that the following authorizing legislation be considered for DEA for fiscal years 1989 and 1990:

"The Drug Enforcement Administration may employ persons or organizations, on a temporary basis, by contract or otherwise, provided that no person or organization so employed will be considered a Federal employee as defined in title 5, U.S.C."

"Notwithstanding any other provisions of law, the Drug Enforcement Administration is authorized on and after October 1, 1988, to employ or otherwise contract without regard for Sundays, Federal holidays, and the regular workweek with persons at regular rates, prescribed and periodically adjusted by the Administrator, Drug Enforcement Administration, for work necessary in support of enforcement, intelligence, and administrative activities that are urgent and critical to the mission of the Agency but are of a temporary nature."

The Department requests statutory authority to make emergency employment actions for performance of jobs such as laborers to unload bulk seizures, drivers of tractor-trailer trucks, emergency clerical support, etc., that could be hired under simple, but quick procedures and not become regular DEA employees or count against DEA's employment ceiling.

The Department of Agriculture currently has similar authority that can be found in 7 U.S.C. 2225 and 2226. The authority gives Agriculture the ability to hire temporary employees as emergencies occur.

Immigration and Naturalization Service (INS)

INS is authorized, under H.R. 4710, \$1,023,529,000 for FY 1989; this is \$590,000 below the combined amounts of the President's budget of \$859,276,000 for the appropriation, \$75,057,000 for the User Fee Program, and \$89,786,000 for the Legalization Program. At this time, this authorization level appears to be sufficient.



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Page 4, Sec. (101)(15)(c) should be changed to read as follows:

(c) not to exceed \$400 in each fiscal year per employee for members of the Border Patrol and not to exceed \$300 in each fiscal year per employee for immigration inspectors, detention officers and immigration information officers of the Immigration and Naturalization Service who are required by regulations or statute to wear a prescribed uniform in the performance of official duties.

Including immigration information officers among those eligible to receive a uniform allowance is highly justifiable. These employees meet the public and must be readily identifiable and present a fully professional appearance. The uniform they are required to wear is expensive. Its cost constitutes an economic hardship for employees whose entry grade is GS-5. Providing this allowance will remedy a serious deficiency in the Service's uniform allowance policy.

#### Federal Prison System (FPS)

H.R. 4710 as reported for the Federal Prison System including the National Institute of Corrections, authorizes \$1,380,084,000 for fiscal year 1989, that is \$125,145,000 or 8 percent below the amended President's budget of \$1,505,229,000. The original President's budget is insufficient to meet FPS needs in 1989 as a result of the effects of the Mariel Cuban riots, and an amended budget has been sent to Congress. The amounts of the two pending amendments are \$36,486,000 for Salaries and Expenses and \$88,659,000 for Building and Facilities. Therefore, \$970,195,000 is needed in FY 1989 for the Salaries and Expenses appropriation instead of the \$933,709,000 as reported in H.R. 4710, and \$525,213,000 which shall remain available until expended instead of the \$436,554,000 as reported in H.R. 4710, is requested in FY 1989 for (i) planning, acquisition of sites and construction of new facilities; (ii) the purchase and acquisition of facilities and remodeling and equipping of such facilities for penal and correctional institutions; and (iii) the payment of United States prisoners for work performed in these activities.

#### II. Authorization Language

H.R. 4710 contains several specific authorities that we believe are necessary and proper. We urge that the following amendments be incorporated or added to the bill:

#### Section 202(b) - Authority Relating to the Federal Bureau of Investigation

Under Title II, Section 202(b), the language of H.R. 4710 is consistent with the FBI's request for FY 1989. However, under the two-year provision of H.R. 4710, the Administration has not

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completed consideration of 1990 requirements, and we are not prepared to comment on the sufficiency of this provision for 1990.

**Section 203 - Reports Regarding Training of Foreign Law Enforcement Personnel**

This section requires that reports be made to the House and Senate Judiciary Committees in each of the fiscal years regarding all training of foreign law enforcement personnel conducted by the Department of Justice with funds authorized to be appropriated by Title I. Inasmuch as the Department is regularly involved in the training of foreign law enforcement personnel, as well as participating actively in seminars and symposiums involving foreign law enforcement personnel, some clarification as to the scope, purpose, and intent of this section should be provided. If it pertains, in fact, to the training of foreign law enforcement personnel in foreign countries, this would not appear to be an overly burdensome requirement. If, in fact, it would refer to all training of foreign law enforcement personnel, the Department would question the practicality of this requirement and would suggest it would be overly burdensome.

**Section 204 - Undercover Investigative Operations of the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA)**

This section relates to undercover investigative operations of FBI and DEA. While not objecting specifically to any of the language contained in this section, the Department would prefer the enactment of permanent authorizations and exemptions for undercover investigative operations for FBI and DEA and the extension of similar authority to the Immigration and Naturalization Service (INS) and U.S. Marshals Service (USMS). (This is the proposal as reported in S. 938, the Department of Justice Appropriation Authorization Act for Fiscal Years 1988 and 1989, which passed the Senate last Session.) There are literally dozens of provisions of law that mandate a Government agency to obtain a product in a prescribed manner. There are a similar number of laws that require a particular function to be conducted by a specific Government agency, such as leasing property by the General Services Administration. The enactment of an amendment providing permanent authorizations and exemptions in generic terms for conducting undercover operations would place in the law the flexibility needed by the FBI, DEA, INS, and USMS to conduct effective undercover operations.

**Section 207(c) - Contesting and Defending Statutes of the United States**

This provision would prohibit the Department from proceeding in the name of the United States in cases where the Department

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determines that a statute is unconstitutional. We understand that some Members of Congress have been displeased by the appearance of the executive branch, in the name of United States, as a party in litigation where the executive branch has taken positions opposing the validity of Congressional enactments or actions. The provisions of Section 207(c), requiring the Department to proceed in the name of the client agency in cases where the Department concludes that a statute is unconstitutional, create procedural difficulties which are more serious than the perceived affront to those Members of Congress offended by the appearance of the United States in such litigation. The United States is a legal person capable of appearing in litigation to vindicate its rights. United States v. Cooper Corp., 312 U.S. 600, 604 (1941). Legal action may not proceed in the name of an agency unless expressly authorized by statute. Blackmar v. Guerre, 342 U.S. 512 (1952). The provisions of Section 207 precluding the appearance of the United States, thus raise the possibility of requiring the Department to proceed in the name of a party without authority to proceed.

#### Section 208 - Limitation Regarding the Per Se Prohibition Against Resale Price Maintenance

The Department objects to Section 208 of the Bill, which raises constitutional concerns. Section 208 prohibits the Department from using appropriated funds "for any activity the purpose of which is to overturn or alter the per se prohibition against resale price maintenance in effect under the Federal antitrust laws. . . ."

Article II of the Constitution assigns responsibility for executing the laws to the President. Unless read exceedingly narrowly, Section 208 would interfere with the President's ability to perform this constitutional function. Moreover, the restriction potentially imposes an unconstitutional burden on executive branch officials charged with enforcing the antitrust laws. Congress may, of course, enact new or different antitrust laws, but it may not arrogate to itself the power to interpret and implement indirectly existing law, which is a central function allocated by the Constitution to the executive branch. See generally INS v. Chadha, 462 U.S. 919, 951 (1983). It is inappropriate, in our view, for Congress to restrict through an appropriations authorization bill the executive branch's spending on enforcement of the antitrust laws while leaving those laws substantively unchanged.

Moreover, the restriction contained in Section 208 is wholly unnecessary. The policy of the Department of Justice is to treat resale price maintenance agreements as illegal per se in accordance with existing Supreme Court holdings. Officials of the Department have so stated on numerous occasions in Congressional testimony, correspondence with Members of Congress,

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and in speeches. In its amicus curiae brief submitted at the request of the Supreme Court in Business Electronics Corp. v. Sharp Electronics Corp., No. 85-1910, 56 U.S.L.W. 4387 (U.S. May 2, 1988), the Department did not urge that the per se rule against resale price maintenance articulated in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), and subsequent Supreme Court decisions be overturned or altered. It remains the policy of the Department fully to enforce the per se rule against resale price maintenance agreements as set forth in governing Supreme Court precedent, unless and until that rule is overturned by the Court.

#### Section 209 - Prohibition Against Privatizing Penal and Correctional Institutions

The Department opposes this prohibition on privatizing penal and correctional institutions. The President's 1989 budget request, currently being considered by the Congress, includes a pilot proposal for the private operation and management of a entire minimum security facility.

In light of the rapidly expanding inmate population and austere budget climate, privatization efforts should be supported by the Department as an area that can potentially reduce Federal correctional costs.

#### Section 210 - Limitation On The Use Of Funds For Polygraph Screening

The Department is opposed to the language in Section 210 regarding the use of funds to administer polygraphs. First, many Departmental organizations such as the FBI currently administer polygraphs to applicants if the applicant desires such a test to certify the information they provided or if the FBI deems one is required to assure accuracy of information. Polygraphs are also administered to individuals who are cooperating in an investigation when it is necessary to determine the validity of information provided by the informant. Limiting the Department's activities in this area will impose a serious hardship in the conduct of our basic investigative mission.

As it stands, the Department would also be prohibited from using the polygraph as a security program investigative tool to resolve matters involving security risks or vulnerability, if a specific law has not been violated. In an operational context, the polygraph is a valuable tool to assist in control of double agents, ascertaining truth or veracity of asset information which cannot otherwise be ascertained in a timely fashion, and in damage assessments when criminal action is not contemplated. There are cases in which the perceived threat of being faced with a polygraph has saved intelligence agencies from penetration attempts, as well as further damage from an ongoing penetration.

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Finally, the Department's Justice Command Center (JCC) would have to terminate its program. In November 1987, Director Constance Horner of the Office of Personnel Management approved a program for administering "counterintelligence-style" polygraph examinations to JCC personnel entrusted with access to cryptographic systems and keeping materials used in transmission of classified information. Since the examinations administered to JCC personnel do not come within the exception to the prohibition, enactment of this section would appear to terminate the JCC program.

In summary, it is vitally important that this section be amended so as not to limit the Department's use of the polygraph to investigations of a specific incident involving a violation of law. In accordance with Department regulations, the polygraph is used selectively as an investigative and national security aid and results are considered within the context of a complete investigation. Polygraph results are not relied upon to the exclusion of other evidence or information obtained during the course of a complete investigation. Examinations are administered only to individuals who agree or volunteer to take them.

#### Conclusion

As H.R. 4710 does not authorize appropriations at the level requested by the Administration, several of its funding level provisions will have a substantial impact on the ability of the FBI, the U.S. Attorneys, the Federal Prison System, and other components of the Department to carry out their responsibilities. This will result in program reductions in several critical areas. If we are to accomplish our goals in the war against drugs, eliminating prison overcrowding, fighting terrorism, and providing quality representation in the courts, the President's request should be enacted.

We would be pleased to work with the Committee to resolve any differences, and we appreciate the Committee's support as set forth in many of the provisions of H.R. 4710.

Sincerely,

Thomas M. Boyd  
Acting Assistant Attorney General